**YEO TSE SOON & ANOR.**

**v.**

**PUBLIC PROSECUTOR**

COURT OF APPEAL, BRUNEI DARUSSALAM
K.T. FUAD PCA, ALAN HUGGINS CCA, A.M. Mc MULLIN CCA
[CRIMINAL APPEAL NO. 2 OF 1994]
12 DECEMBER 1994

***CRIMINAL PROCEDURE****: Accused charged for offences under ss. 323, 427, 448 & 458 of Penal Code - Submission of no case to answer at end of prosecution case - Accused called to enter upon their defence - Convicted and sentenced at close of defence case - Appeal - Duty of Magistrate or Judge sitting alone in deciding whether or not to call upon an accused to enter on his defence - Meaning of "which if unrebutted would warrant his conviction" appearing in s. 177(1) Brunei Criminal Procedure Code - Consideration of the decision in DPP v. Haw Tua Tau - Comparison with Khoo Hi Chiang v. PP.*

***INTERPRETATION OF STATUTES*** *: Section 177(1) Brunei Criminal Procedure Code - Meaning of the words "which if unrebutted would warrant his conviction".*

***EVIDENCE*** *: Appeal against conviction and sentence - Material witness giving statement to police - Refusal by prosecuting authorities to make statement available to defence - Witness untraceable - Duty of prosecution to disclose - Effect of failure to do so - Trial Judge refusing to order production - Whether wrong exercise of discretion - Whether there was a material irregularity.*

***EVIDENCE*** *: Criminal charge - Appeal against conviction and sentence - Material contradictions in evidence of witnesses - Credibility of witnesses - Forensic evidence in favour of defence - Inherent improbability of complainant's claim - Possibility of frame-up - Whether convictions unsafe.*

The accused were each convicted and sentenced of offences under ss. 323, 427, 448 & 458 of the Penal Code. They appealed and argued that the learned trial Judge should have allowed the submission of no case to answer, as at the conclusion of the prosecution case the evidence was in such a state of contradiction and disarray that they should never have been called upon to answer to these charges.

The Court of Appeal was called upon to determine the duty of a Magistrate or a Judge sitting alone in deciding whether or not to call upon an accused person to enter on his defence as set out in s. 177(1) of the Brunei Criminal Procedure Code. In this regard, the Court considered the opinions expressed in *DPP v. Haw Tua Tau* and the conflicting decision in *Khoo Hi Chiang v. PP*.

The further question that arose was whether, in the light of the failure of the prosecution to make a material witness's statement available to the defence and the contradictory evidence produced at the trial, the convictions against the appellants were unsafe.

**Held:**

**[1]** It was the equation of jury trial principles in the United Kingdom with those applicable under the statutory provisions binding on a Judge or Magistrate sitting alone in trials in Malaysia which was perceived by Edgar Joseph Jr. SCJ in *Khoo Hi Chiang v. PP* as the "sheet anchor" of Lord Diplock's opinion in *DPP v. Hwa Tua Tau* and which caused him to dissent therefrom. Lord Diplock in *Haw Tua Tau* did not treat the words "which if unrebutted

would warrant a conviction" as meaning no more than "which if unrebutted could or might warrant a conviction". While some warrants may contain an order compelling the performance of an act, the essence of the verb "warrant" is the authorisation of the act. Accordingly a case which if unrebutted would warrant a conviction is not one which would necessarily compel a conviction if unrebutted: the section says "made out" not "proved".

**[2]** Whilst it was true, as the Supreme Court emphasized in *Khoo Hi Chiang*, that the legislation it was considering nowhere referred to a "*prima facie*" case, the words of the statute (which in this connection were identical to those of the Brunei statute) were apt to describe a *prima facie* case. Once the prosecution has adduced evidence which reveals all the elements of the offence and which is not so completely discredited that no reasonable tribunal of fact could believe it, a case has been made out which if unrebutted would warrant a conviction. It is immaterial that the Judge or Magistrate may have doubts as to its credibility; the time is not appropriate for him to decide whether it is credible or not, subject only to the reservation that he must be satisfied that it could be believed - which is a question not of fact but of law. That being so, there is no justification for distinguishing between the procedure to be followed in a trial by jury and a trial by Judge alone.

**[3]** That was the position at common law before the enactment of the legislation in Brunei and Malaysia. The principle that issues of fact should not be decided (even provisionally) until the whole of the evidence in the case has been heard is fundamental to the adversarial procedure. If the legislature had intended to abrogate such a fundamental principle, very clear language indeed would have been required. Far from using such language they have used language which is entirely consistent with the established principle and it is unnecessary to go on to indicate the serious results which would flow from abandoning it.

**[4]** What is required of a prosecutor if he is to surmount the hurdle of "no case" is that he must make out a case which if unrebutted would warrant a conviction. To read the words of the section "... if it finds that no case has been made out which if unrebutted would warrant a conviction..." as though they meant "if it finds that no case has been proved beyond reasonable doubt which if unrebutted..." would be to eliminate from further scrutiny cases in which the evidence may be distinctly questionable in some respects but in which nevertheless the Magistrate or Judge is not yet prepared to say that he finds it so inherently incredible that the accused should not be called upon to answer to the charge. In short, to "make out" a case is not the same thing as to prove it beyond all reasonable doubt.

**[5]** In the circumstances the Court must decline to follow the decision in *Khoo Hi Chiang*. Applying the principles in *Haw Tua Tau's* case, a trial Judge or Magistrate sitting alone is only entitled to interfere at the stage of no case and to stop the case if he is satisfied that some essential element in the charge has not been covered by evidence or if the evidence as a whole is so inherently incredible that no reasonable person could accept it as being true. The Court was satisfied that the evidence at the close of the prosecution case was not so inherently incredible so as to be able to say that the trial Judge had erred in calling upon the defence.

**[6]** However, in the circumstances of the present case, the trial Judge should have realised that it would not be realistic to refuse production of the material witness's statement to the police on the ground that it was open to the defence to call him as a defence witness. It is clear that, by the time he gave his ruling, Counsel for the appellants', although they could not know the contents of the statement in detail, were satisfied that it could, at the very least, yield valuable matter for the purposes of cross-examination. This was one of the two grounds on either of which the Court in *Lawson's* case was prepared to interfere.

**[7]** Although the complainant was cross-examined to some extent on the basis that the said witness had told the police that it was the complainant who had initiated the violence, it is not possible to say that the defence was not materially hampered in the endeavour by Counsel to shake the only testimony which stood against the appellants on these serious charges. In the circumstances, a material irregularity had occurred through a wrong exercise by the Judge of this discretion in refusing to order production of the statement.

**[8]** The issue of the credibility of the witnesses, the evidence of the forensic expert, the inherent improbability of the complainant's claim that the second appellant had been able to prise open the grill and struggle through the narrow gap thereby created, the possibility of a frame-up and the refusal by the prosecution to make the witness's statement available to the defence were sufficient to show that the convictions were unsafe.

*[Appeals allowed. Convictions and sentences set aside].*

**Cases referred to:**
*DPP v. Haw Tua Tau [1981] 2 MLJ 49* ***(foll)***
*Ang Swi Eng v. PP (Brunei Criminal Appeal No. 1 of 1984) (unreported)****(refd)***
*Khoo Hi Chiang v. PP [1994] 1 MLJ 205* ***(not foll)***
*Munasamy v PP [1987] 1 MLJ 49* ***(cit)***
*A. Ragunathan v. T.R. [1982] 1 MLJ 139* ***(cit)***
*Junaidi bin Abdullah v. PP [1993] 3 MLJ* ***(cit)***
*PP v. Fong Ah Tong & Chong Cji Shan [1940] MLJ 240* ***(refd)***
*Dallison v. Caffrey [1965] 1 QB 348* ***(refd)***
*R v. Bryant & Dickson [1946] 31 Cr. App. R. 146* ***(refd)***
*R v. Lawson [1990] 90 Cr. App. R. 107* ***(foll)***
*R v. Ward [1993] 1996 CA 1* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 111 to 117(1), 177(1)
Penal Code, ss. 323, 427, 448 & 458
Penal Code, s. 189(1) (Singapore)
Penal Code, s. 180 (Malaysia)

**Other sources referred to:**
*Archbold*, 43rd Edn.

*For the appellants - Ahmad Isa, (Siva Sankaran with him); Ms. Ahmad Isa Lee & Lind*
*For the public prosecutor - Radin Shafie, DPP*

**JUDGMENT**

**A. M. McMullin CCA:**

On 30 November we allowed the appeals of both appellants and quashed the conviction reserving our reasons until later. We now give those reasons.

The appellants Yeo Tse Soon and Yeo Tse Shoon were jointly charged before the Intermediate Court with four offences arising out of events which occurred on the night of 14 July 1993 at the dwelling house of the complainant, Goh Kim On. At the conclusion of a trial extending over several months they were each convicted of the following offences; **1st charge** house breaking by night contrary to the provisions of s. 458 of the Penal Code; **2nd charge** criminal mischief contrary to the provisions of s. 427 of the Code; **3rd charge** causing hurt to the householder Goh Kim On contrary to the provisions of s. 323 of the Code; **4th charge** criminal trespass contrary to the provisions of s. 448 of the Code.

It was the case for the prosecution that these offences were committed by them pursuant to a common intention in furtherance of an attempt to gain repayment of a debt allegedly owed by the complainant to the 2nd appellant.

Upon conviction, on 17 August 1994, they received sentences of 9 months on the 1st charge and 3 months each on the 2nd, 3rd and 4th charges, all of these to run concurrently. The Judge also imposed corporal punishment on both appellants under the 2nd charge - 2 strokes each. This part of the sentences remained in suspension depending on the result of this appeal.

It is not in dispute that the complainant Goh did receive the injury which is the substance of the 2nd charge at the hands of the 2nd appellant in the course of a confrontation between them at the house of the complainant in the early hours of the morning of 14 July. It is common ground also that he had been accompanied there by his elder brother, (the 1st appellant) and by another man, Lau Foo Tze. It may also be said to be common ground that the presence of these three in the vicinity of Goh's premises at that hour related to the payment of money allegedly owing from the complainant to one of the brothers, but the precise nature of the claim as well as every detail in the actions and intentions of the several participants in the course of this encounter were hotly disputed at the trial. In particular, it was the defence case that the blow which injured Goh was struck in self defence.

The case for the prosecution, which in large measure depended on the testimony of Goh himself, was that after he had retired for the night he was aroused from sleep at about 1.00 a.m. by a phone call from the 2nd appellant asking him to come downstairs. He did so and took with him a cheque for B$5,000. which had been made out some time previously by him in favour of the 1st appellant. It was never clearly explained by him at the trial why he was prepared to do this, since he maintained that he did not owe money to either of the brothers, though there is some suggestion in his evidence that what was being claimed by the 2nd appellant was repayment of a gambling debt owing to the 1st appellant in "four digit" gambling. It may be convenient at this point to note that the defence case on this matter was that the purpose of the visit to Goh's house was to receive part payment of an outstanding debt of B$25,000 which had been owing for a considerable period of time and which the complainant had agreed to pay by instalments a few days earlier. It was claimed that this was in respect of a previous loan of money.

Goh went on to say that on arriving downstairs he found the two brothers standing outside the locked metal grille by which the entrance to his house is protected. He first slid back a glass and aluminium frame which lies immediately behind the grille and then he handed the cheque to the 2nd appellant through the grille, and immediately his hand was seized by the 2nd appellant and pulled strongly so that in the process of trying to free himself he hurt his hand on the metal grille. Then, alerted to what he perceived as the hostile intentions of his visitors and still holding the cheque, he ran upstairs and seized a parang which was kept by him in his bedroom. At the moment of his flight he had seen the 2nd appellant using a length of metal pipe to wrench at the grille in an apparent attempt to force entry, the grille itself being locked. He said that having snatched up his parang he then, on leaving his bedroom, encountered the 2nd appellant immediately outside the bedroom door. The latter was still holding the metal pipe and they went downstairs, the 2nd appellant leading the way, and found the 1st appellant already in the sitting room. The 1st appellant told them to throw away their weapons and settle the matter amicably. He threw away his weapon but the 2nd appellant did not, and as Goh turned and spoke to the 1st appellant and 2nd appellant struck

him on the head from behind with the pipe, causing it to bleed and making him feel dizzy. Immediately thereafter the 2nd appellant broke the glass in a cabinet which was nearby using the metal pipe.

Undisputed medical evidence showed that Goh had suffered a scalp wound to the back of his head on the right side which could have been inflicted by the metal pipe. It was not a very serious injury but did require stitching.

Goh went on to say that after he received this blow he challenged the 2nd appellant to face him like a man, one to one. At this point his close neighbour and friend Lim Koh Keng (PW8) arrived at the house and persuaded him not to persist in fighting, being assisted in this task, according to that witness, by the 1st appellant, who helped to pull the two men apart. According to him, however, this had occurred in the compound outside the house. Thereafter, Goh said, he unlocked the metal grille and the two appellants left the premises. He told the Court that anticipating trouble he had summoned a friend by telephone after receiving the call from the 2nd appellant, and this man, (Ah Sim) and two other friends of Goh turned up at this point as the two appellants were leaving. Some time later Ah Sim took Goh to the nearby hospital where he was examined and treated by a doctor at 2.30. Ah Sim later took him and two police officers who had been contacted from the hospital back to Goh's house. One of the glass panels of the sliding aluminium door was found to have been broken and it was Goh's evidence that this had been done by the 2nd appellant while the latter was prising open a portion of the metal grille.

The police found some blood stains and a cheque for B$5,000 made out to the 1st appellant on the floor of the sitting room and a similar blood stain outside the house in the compound, which was referred throughout as the "garage" but part of which is in effect a sort of car-port immediately adjoining the house. The compound is separated from the street by pink-coloured metal gates.

Apart from the police evidence and that of the doctor who examined the complainant, the only other important witness for the prosecution was the complainant's neighbour, Lim Kok Kheng. The evidence of this witness, a good friend of the complainant over many years, differs starkly and surprisingly in certain very important particulars from the testimony of the latter. In so far as the record of the proceedings can guide us not a great deal seems to have been made of these discrepancies by Counsel who represented the appellants in the Court below and who, it would seem, in submitting that their clients had no case to answer, appear to have concentrated principally upon perceived deficiences in the complainant's own testimony. Before this Court Mr Ahmad Isa who appears for both appellants has however thoroughly ventilated these discrepancies both in his written argument and his address to the Court, and to that I will return.

The trial Judge rejected the submissions of no case and the 1st appellant gave evidence, and several other witnesses were called for the defence. The 2nd appellant did not give evidence nor was any evidence available from Lau Foo Tze who it appears had left the territory and remained untraced at the time of the trial.

The defence case, which rested principally upon the evidence of the 1st appellant, was that the visit to the complainant's house on the night of the 14th. had been made pursuant to an arrangement agreed between the 2nd appellant and the complainant at the house of the 2nd appellant's father-in-law a few days previously on 11 April. Under this arrangement Goh was to repay a loan of B$25,000 which had been owing for some time to the 2nd appellant. A first instalment of B$5,000 together with an IOU or promissory note for the remaining B$20,000

was to be handed over to the appellant in return for a receipt for the B$5,000 at the home of the complainant whenever the 2nd appellant saw fit to collect payment. Because Goh was well known to both the brothers as a gambler who frequently pursued this pastime in late night sessions, it was decided to call upon him at a late hour in order to be sure of finding him in.

The 1st appellant said that he had agreed to accompany his brother as a witness in the collection of this debt, and because neither of them knew the exact address of the complainant in Bandar - they both live in Kuala Belait - they enlisted the help of a mutual acquaintance (Lau Foo Tze) who was a gambling familiar of the complainant and knew where his house was. All three made the journey by night to Bandar arriving at Goh's house about midnight. Lau Foo Tze rang the bell and, on his getting no response, the 1st appellant used his mobile telephone to arouse Lim Kok Kheng (PW8) who lives in a house a short distance away on the opposite side of the street from the complainant. Lim came down to meet them in the street and the 1st appellant explained the nature of their errand and from Lim they obtained the telephone number of Goh. The 2nd appellant then rang Goh, who agreed to come down and meet them. According to the 1st appellant he remained by his car which was parked on the road near Goh's house, and the 2nd appellant and Lau approached the front door. According to the 1st appellant the pink gates were open at the time. The 1st appellant saw Goh rushing suddenly out of the house wielding a parang and he observed that the 2nd appellant had possessed himself of a length of metal pipe which had been lying nearby. The 1st appellant was frightened and got into his car. He then heard a noise as of metal striking metal, after which Goh rushed back into the house again. The 1st appellant then saw Lim (PW8) passing by his car and entering Goh's compound. The appellant himself then approached the front door and asked Goh to come out, which he did. At this point the appellant noticed that Lau Foo Tze was holding a length of metal pipe in his hand, and he also observed that the complainant had some blood upon his head. He advised him to go to hospital, but Goh replied angrily and then challenged the 2nd appellant to fight him and aimed a couple of fist blows at the 2nd appellant's chest. The 1st appellant then helped Lim to separate the two, and seeing that his efforts at conciliation were useless, he turned and made his way out of the gate to go to his car. As he left the gate another car drew up suddenly and three men got out and stared at him fiercely. These were in fact Ah Sim, who the complainant had summoned earlier and Ah Sim's two friends, who had presumably come to support him. The appellant ignored them and Goh himself called out to these three that nothing was amiss. The 1st appellant and his brother and Lau Foo Tze then returned in the 1st appellant's car to Kuala Belait.

The 1st appellant's testimony was supported in certain very material respects by the evidence of the 8th prosecution witness, Lim. Although this witness, on his account of the matter, had witnessed only the concluding incident involving the attempt by Goh to strike the 2nd appellant with his fist, it can be said that his evidence as a whole lent considerable substance to the defence contention that there had been a sudden erruption of violence in the compound outside the house in which the 1st appellant had played no part other than by assisting Lim to separate Goh and the 2nd appellant who was not armed, whereas at that moment he saw that Lau Foo Tze was holding the metal pipe. He confirmed the 1st appellant's evidence that the latter was inside his motor car when Lim passed on his way to the compound. Upon being recalled in the course of the prosecution case, at the request of the prosecutor, he told the Court that he had not seen any damage either to the grille or the glass door which were both clearly visible to him.

It is common ground that all of these people were long term acquaintances who, apart from this dispute about money, had also been on friendly terms with each other in the past. It is also not disputed that the metal pipe which the complainant claimed to have been wielded by the 2nd appellant that night was the property of Goh himself and had been lying in the compound on the arrival of the two brothers and their friend Lau. It was in fact found in the compound by the police upon their arrival at the scene.

It will thus be seen that the trial Court was presented with two totally different versions of what had occurred in the early morning of 14 July. The appellants in effect were denying that any of them had ever entered the house at any stage with any common intent whatsoever. They denied being responsible for any damage to the sliding glass door or to the cabinet or to the metal grille. It is therefore a necessary ingredient of the defence case that this damage had been caused by Goh himself in a cunning endeavour to be revenged upon the 2nd appellant by fabricating evidence to support these very serious charges.

From the several grounds of appeal which Mr Ahmad in a careful and elaborate address has put before us, I propose to turn first to the point raised on the refusal by the trial Judge to accede to the submission of no case, although it was not the first of his points, because it raises a question of fundamental importance as to the duty of a Magistrate or Judge sitting without jury or assessors in considering such submission. It was Counsel's contention that at the conclusion of the prosecution case the evidence was in such a state of contradiction and disarray that his clients should never have been called upon to answer to these charges.

It is not surprising, if only in view of the evidence of Lim, that a submission of no case should have made on behalf of both the appellants. At that stage Counsel for both appellants were relying on the evidence of Lim (PW8), and the evidence of the police who visited the scene, to challenge the coherency of Goh's story and to highlight the probability, as they deemed it, of his having manufactured evidence to suit his own purposes.

Although the record of trial does not reveal in detail the nature of this objection it does reveal that Counsel sought to persuade the Judge "to impeach the credibility of Goh as a witness", and to that end submitted a written joint submission to the Court at the outset of the no case submissions. It is not quite clear what was meant by this odd usage but it would seem to have amounted to nothing more than the confrontation of PW2 with his statement to the police and cross examination on matters contained in it which were discrepant with his evidence at the trial (see pp. 72 to 77 of the record of the proceedings). The written joint submission was presumably a summary of this which the Judge simply treated as part of the submission of no case (p. 208 of the record). It was, presumably, used in order to lend some additional weight to the major contradictions between Goh (PW2) and Lim (PW8) in order to persuade the trial Judge that the evidence of the complainant was so manifestly untrustworthy, and so greatly in conflict with that of Lim, that it should be totally disregarded, thus leaving no factual basis upon which any conviction could be grounded.

This written submission is not before us and we cannot speculate as to what extent the alleged discrepancies were pressed upon the trial Judge. The general line taken may be gathered from the cross examination of Goh after the introduction of his statement to the police. It is not necessary to consider this matter further save to say that we would be very slow to assume that the trial Judge was not as fully apprised as we have been of the matters complained of by Counsel before us, or that he was unaware of the high degree of contradiction which existed between the prosecutions two most important witnesses on factual points of substance. This latter does indeed seem to be the major support, both in the Court below and before this Court, for the argument that the Judge erred in calling upon the

appellants to answer the charges. At that stage of course the Counsel for the appellants and the Court below did not have the evidence of the forensic expert Professor Chao Tze Cheng, who gave evidence for the defence concerning the nature of the damage to the premises, and to that I shall return later.

The major differences between the evidence of the complainant and that of Lim (PW8) will be apparent from the recital of the evidence already given and it will thus be seen that at the point of the submission of no case the trial Judge had to exercise his mind upon a considerable body of evidence led by the prosecution in support of its charges, much of which tended to call in question the veracity of the complainant.

The duty of a Magistrate or a Judge sitting alone in deciding whether or not to call upon an accused person to enter on his defence is set out in s. 177(1) of the Brunei Criminal Procedure Code which reads as follows:

> If upon taking all the evidence referred to in s. 176 and making such examination (if any) of the accused under s. 220 as the Court considers necessary it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Court may, subject to the provisions of s. 186, record an order of acquittal.

These provisions are, for all material purposes relevant to the present ground of appeal, in form identical with the equivalent provisions in the Malaysian and Singapore Codes (s. 189(1) Singapore; and 180 Malaysia), the formula now under particular scrutiny - "which if unrebutted would warrant his conviction" - being identical in each case.

These provisions were carefully analysed by Lord Diplock in *DPP v. Haw Tua Tau* on appeal to the Privy Council from the judgment of the Court of Criminal Appeal of Singapore reported in [1981] 2 MLJ 49. At p. 51 he puts the matter thus:

> Section 188(1) states the conditions precedent to the right and duty of the Judge of trial to call on the accused to enter on his defence. It takes the form of a double negative: if the Court does not find that no case against the accused has been made out which, if unrebutted, would warrant his conviction. For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the Court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the Court to do so.
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> The crucial words in s. 188(1) are the words "if unrebutted", which make the question of the Court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such that the words "if unrebutted" refer. What they mean is that for the purpose of reaching the decision called for by s. 188(1) the Court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

He went on to illustrate the point by reference to trials with a jury, and he said:

> In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single Judge (or in two Judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of s. 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and Counsel on both sides have addressed to the Judge such arguments and comments on the evidence as they may wish to advance.
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> Although s. 188(1) first became law in 1960 and so forms no part of the amendments made by Act No. 10 of 1976, their Lordships have dealt with its interpretation at some length because in the judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kek v. Public Prosecutor* there are certain passages that seem, upon a literal reading, to suggest that unless at the end of the prosecution's case the evidence adduced has already satisfied the Judge beyond a reasonable doubt that the accused is guilty, the Judge must order his acquittal. But this can hardly have been what that Court intended for it ignores the presence in the section of the crucial words "if unrebutted", to which in other passages the Court refers, and it converts the hypothetical question of law which the Judge has to ask himself at that stage of the proceeding: "If I were to accept the prosecution's evidence as accurate would it establish the case against the accused beyond a reasonable doubt?" into an actual and quite different question of fact: "Has the prosecution's evidence already done so?" For the reasons already discussed their Lordships consider this to be an incorrect statement of the effect of s. 188(1).

It will be seen therefore, applying these principles, that a trial Judge or Magistrate sitting alone is only entitled to interfere at the stage of no case and to stop the case only if he is satisfied that some essential element in the charge has not been covered by evidence or if the evidence as a whole is so inherently incredible that no reasonable person could accept it as being true.

The principle that the accused must be called upon unless the prosecution evidence is inherently incredible has since then been followed in the territory (*Ang Swi Eng v. PP*: Brunei Criminal Appeal No. 1 of 1984) and no doubt in other cases, for such has generally been the understanding of what constitutes a *prima facie* case in common law jurisdictions elsewhere.

Mr Ahmad however referred us to the decision of the Malaysian Supreme Court in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 205, in which Edgar Joseph SCJ, giving the judgment of the Court, surveys a long line of Malaysian and other authorities extending back over fifty years and comes down upon a very different principle which, expressly disavowing the reasons in *Haw Tua Tau*, is stated in the following terms (p. 290):

> Consequently, the duty of the Court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible - the *Haw Tua Tau* test - but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

Earlier in his judgment the learned Judge had pointed out (p. 278) that the language of s. 180 of the Code is not new and he went on to say:

> Until the decision of the Privy Council in the Singaporean case of *Haw Tua Tau v. PP*, there had been a consistent current of judicial opinion in this country that at the close of the case for the prosecution, the onus imposed upon the prosecution by s. 180 of the Code (and, in the same way, by ss. 173(f) and 190), was to tender evidence which, if unrebutted, would warrant a conviction and that only evidence beyond all reasonable doubt was of that nature.

Having reviewed the many cases in which that principle had been followed in Malaysia and elsewhere he declined to follow the more recent decisions in *Munasamy v. PP* [1987] 1 MLJ 49; *A Ragunathan v. T.R.* [1982] 1 MLJ 139 and the most recent case of *Junaidi bin Abdullah v. PP* [1993] 3 MLJ in each of which the appellate Court had approved the line indicated by Lord Diplock in *Haw Tua Tau*, although in *Munasamy* and *Junaidi* it appears that those Courts did so on the ground that the *Haw Tua Tau* test was not conceptually different from the test applied in the pre-*Haw Tua Tau* cases - a view rejected by the Court in *Khoo*.

The decision in *Khoo* is thus evidently something of a watershed in the Malaysian case law on this topic and is clearly intended as a call to order, drawing back the Malaysian Courts from a temporary wandering in the diversionary path of the English Judge and jury procedure. Although the decisions of the Board were formerly binding on the Malaysian and other common law Courts in this area, they are no longer so in Malaysia. Moreover, the learned Supreme Court Justice was also able to depart from *Haw Tua Tau* in this instance since, as he correctly said, this observation of Lord Diplock did not form part of the *ratio decidindi* in that case.

It was the equation of jury trial principles in the United Kingdom with those applicable under the statutory provisions binding on a Judge or Magistrate alone in trials in Malaysia which was perceived by Edgar Joseph SCJ as the "sheet anchor" of Lord Diplock's opinion and which caused him to dissent therefrom. Following the opinion of Laville J in *PP v. Fong Ah Tong & Chong Chi Shan* [1940] MLJ 240 he took the word "warrant", which appears in the section, to be a "strong word" which would exclude any doubts on the part of a trial Judge or Magistrate, so that the phrase - "which if unrebutted would warrant a conviction" could not be understood as meaning "could or might warrant a conviction".

The importance to the appellants in the present case of the *Khoo* approach is, of course, that if the trial Judge had been considering the evidence of Goh in the way that is there recommended, then in the light of the direct collision between the stories of Goh (PW2) and Lim (PW8), it might have been impossible for the Judge to say at that stage that he was left with no reasonable doubt as to the veracity of Goh, on whose testimony the entire case for the prosecution rested. In calling upon the appellants the Judge was clearly moving upon the line approved by Lord Diplock in the first paragraphs quoted from the opinion in *Hwa Tua Tau* above.

It is argued on the authority of *Khoo Hi Chiang v. PP* itself that we should not consider ourselves bound by that decision on this point as the opinion expressed was *obiter*. We agree that it was *obiter*, but in this jurisdiction we must give it very great weight, especially because it was a considered opinion made with reference to one of the Singapore decisions leading up to *Khoo Hi Chiang*: it is obvious that the Board considered the point sufficiently important to require discussion despite the fact that the issue before it related to the interpretation of the Constitution of Singapore.

With the greatest respect to the Supreme Court of Malaysia we think it has misunderstood the opinion of Lord Diplock. He did not treat the words "which if unrebutted would warrant a conviction" as meaning no more than "which if unrebutted could or might warrant a conviction". It is the word "warrant" which appears to have caused the misunderstanding. Whilst some warrants may contain an order compelling the performance of an act, the essence of the verb "warrant" is the authorisation of the act. Accordingly a case which if unrebutted would warrant a conviction is not one which would necessarily compel a conviction if unrebutted: the section says "made out: not "proved". The Supreme Court emphasized that the legislation it was considering nowhere referred to "a *prima facie* case". That was true, but the words of the statute (which in this connexion were identical to those of the Brunei statute) were apt to describe a *prima facie* case. Once the prosecution has adduced evidence which reveals all the elements of the offence and which is not so completely discredited that no reasonable tribunal of fact could believe it, a case has been made out which if unrebutted **would** warrant a conviction. It is immaterial that the Judge or Magistrate may have doubts as to its credibility: the time is not appropriate for him to decide whether it is credible or not, subject only to the reservation that he must be satisfied that it could be believed - which is a question not of fact but of law. That being so, there is no justification for distinguishing between the procedure to be followed in a trial by jury and a trial by Judge alone.

That was the position at Common Law long before the enactment of the legislation in Brunei and Malaysia. The principle that issues of fact should not be decided (even provisionally) until the whole of the evidence in the case has been heard is fundamental to the adversarial procedure. If the legislature had intended to abrogate such a fundamental principle, very clear language indeed would have been required. Far from using such language they have used language which is entirely consistent with the established principle and it is unnecessary to go on to indicate the serious results which would flow from abandoning it.

What constitutes a *prima facie* case in a criminal trial in Brunei is neither more nor less than the Code provides. What is required of a prosecutor if he is to surmount the hurdle of "No Case" is that he must make out a case which if unrebutted would warrant a conviction. To read the words of the section" ... if it finds that no case has been made out which if unrebutted would warrant a conviction ..." as though they meant: "If it finds that no case has been proved beyond reasonable doubt which if unrebutted ..." etc. would be to eliminate from further scrutiny cases in which the evidence may be distinctly questionable in some respects but in which nevertheless the Magistrate or Judge is not yet prepared to say that he finds it so inherently incredible that the accused should not be called upon to answer to the charge. In short, to "make out" a case is not the same thing as to prove it beyond all reasonable doubt.

For these reasons we must decline to follow the decision in *Khoo* and ask ourselves instead whether the Judge in this case should at the close of the prosecution case have found the evidence to have been so inherently incredible that he erred in calling upon the defence. We are satisfied that he did not so err.

Of the remaining grounds of appeal, that which has given us most concern arises from the refusal by the prosecuting authorities to make available to the defence a statement made to the police by Lau Foo Tze in the course of the police investigation. Lau would clearly have been a most material witness, whether for the state or for the defence, in view of his part in the events of the night of 14 July.

A few days before the commencement of the trial Counsel who then represented the appellants made an application for the inspection of the written statements made to the police by prosecution witnesses. This does not appear to have been seriously pressed and was refused by the Intermediate Court Judge, and no point is taken as to that now. However, during the cross-examination of the complainant Goh (PW2) in the early stages of the trial, it was put to the witness by Counsel for the 2nd appellant that some time after the incident the witness had threatened Lau by saying that if Lau helped the appellants at the trial, he, Goh would make sure that Lau would go to prison as well as the appellants, on Goh denying this, Counsel for the 2nd appellant applied to the Court of Lau's police statement to be given to the defence, giving as his reason that he believed the prosecution did not intend to call Lau and that Lau's statement contained matters which would tend to exonerate the appellants.

The case of *Dallison v. Caffrey* [1965] 1 QB 348 was cited in support of this application. The Judge reserved his ruling on it, and subsequent questions in cross-examination of the witness make it clear that Counsel was putting the complainant's version of the affair, which not only excluded housebreaking on the part of the three men but also ascribed to the complainant the initiation of a violent confrontation in the compound after the latter had unlocked the grille and emerged from the house. All of this was denied by the complainant.

Unfortunately, no ruling on the application to surrender Lau's statement was made until considerably later in the trial.

On 7 June, nearly six weeks later, Counsel for the 2nd appellant once more applied for Lau's statement, again citing *Dallison v. Caffrey*. The prosecutor resisted the application - referring to the decision of the Chief Justice in O.M. 2/87 and stating at the same time that he did not regard Lau as a credible witness and that it was open to the defence to call him if they wished (p. 140 of the record).

The Judge ruled that the prosecutor was entitled to refuse production of Lau's statement but directed that assistance should be given to the defence by the prosecuting authorities in locating Lau so that he might be available to the defence.

In fact Lau was never traced, although Sgt. Deli (PW4) the officer in charge of the investigation did attempt to do so but was informed by Lau's brother that Lau had gone to Singapore. This information emerged at a very late stage in the trial, 2 August 1994 (see p. 295 of the record), when the prosecutor informed the Court that he had not received any report from the police about this matter. The prosecutor himself, who appears to have gone to some trouble to carry out the Court's direction, at that stage endeavoured several times to contact Sgt. Deli and eventually left a message for him, which, as it turned out, never reached him at all.

It was claimed that Lau was a witness whose testimony, had it been available, might well have tipped the scales in favour of the defence even at the stage of the submission of "no case".

The endeavour to have Lau's statement produced was persisted in throughout the trial and at one point subsequent to the rejection of the application to have it admitted on common law principles, Counsel for the 1st appellant in cross-examination of the police officers who had taken that statement sought once more to have it admitted under the provisions of s. 117 of the Criminal Procedure Code. Before this Court Mr Ahmad has also sought to enlist those provisions in support of this ground of appeal. We are satisfied however that the trial

Judge in refusing the application properly interpreted that section as restricted to any statement which had been made to or in the hearing of a police officer by a person who had ultimately been charged with one or more criminal offences.

While we are indebted to Mr Ahmad for his careful analysis of the entire fasciculus of sections appearing in the Code under the heading: "Information to the police and their powers" (ss. 111 to 117 of the Code), we are not persuaded that the wider interpretation he would give to s. 117 is correct. This would seem to follow from the very wording of that section itself - to look no further:

> 117. (1) In any criminal proceedings any statement made by any person, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

In the view of this Court the words "whether before or after that person is charged" can only refer to a person who at some stage has been charged with an offence whether by the police or any higher authority.

The matter stands very differently in relation to the bearing of common law principle on this application for disclosure. In *Dallison v. Caffrey* [1985] 1 QB 348 the duty of the prosecution is stated by Lord Denning MR in these words (p. 369):

> The duty of a prosecuting Counsel or solicitor, as I have always understood, is this: if he knows of a credible witness who can speak to material facts which then show the prisoner to be innocent he must either call that witness himself or make his statement available to the defence.

The head note to the earlier decision in *R v. Bryant & Dickson* [1946] 31 Cr. App. R. 146 puts the matter more stringently in relation to the rights of the defence:

> Where the prosecution have taken a statement from a person who can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence, but they are not under the further duty of supplying the defence with a copy of the statement which they have taken.

On the face of it there is a direct collision between these authorities. However, in *R v. Lawson* [1990] 90 Cr. App. R. 107 Parker LJ refers to the commentary in the edition then current (43rd Edn.) of the *Archbold* where this contradiction is noted and he points out that in *Dallison* the learned Master of the Rolls went on to say, immediately after the passage quoted above:

> It would be highly reprehensible to conceal from the Court the evidence which such a witness can give. If the prosecuting Counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish.

In the presently current edition of *Archbold* this observation appears without further comment. Taking Lord Denning's opinion as a whole, therefore, it might seem that there is little difference between the courses recommended by the Courts in *Dallison v. Caffrey* and *Bryant & Dickson*, save that Lord Denning in *Dickson* does not go on to spell out what the duty of the prosecutor is in relation to the statement of a witness who is not regarded as credible.

In *R v. Lawson*, Parker LJ approves that part of the commentary in *Archbold* where it is said, in dealing with the decision in *R v. Bryant & Dickson*:

> Certain prosecuting authorities and prosecutors not infrequently use this authority as a justification for never supplying the defence with the statement in such circumstances. It should be borne in mind, however, that an inflexible approach to these circumstances can work injustice. For example, the witness' memory may have faded when the defence eventually seek to interview him. Or he may refuse to make any further statement. The better practice is to allow the defence to see such statements unless there is good reason for not doing so.

In *Lawson* the Appellate Court was considering the failure of prosecuting Counsel to make disclosure of a witness statement, the existence of which became apparent to the defence only in the early stages of the trial, and which the defence believed would nevertheless have been helpful to the defence in a material and important particular. In doing so prosecuting Counsel had relied upon the Attorney General's guidelines in cases tried on indictment [1982] 74 Cr. App. R. 302 (para. 2) which provides that there is a discretion not to make disclosure of a statement in the possession of the prosecution if:

> (ii) the statement e.g. from a relative or close friend of the accused is believed to be wholly or partially untrue and might be useful in cross examination if the witness should be called by the defence.

In that case it was only because prosecuting Counsel came to the view, after the conviction of the appellant, that the evidence had in the end not disclosed any such relationship between the accused and the potential witness as he had originally believed to have existed and on account of which, following that guideline, he had not disclosed his statement to the defence. While he still maintained that even then he had been justified in withholding it he very conscionably drew defence Counsel's attention to the matter, and on appeal the failure to disclose was held to have been a material irregularity such that the conviction was unsafe and unsatisfactory and the conviction was quashed.

In the present case from the outset, and even before the trial the existence and potential value of Lau as a witness was known to the defence, and it was also known that he had made a statement to the police which was believed to be of crucial importance to the defence. It also became apparent as the trial progressed that he had proved difficult to contact and that he would not be called by the prosecution even if discovered.

In the latest edition of Archbold it is said that *R v. Bryant & Dickson* and *Dallison v. Caffrey* and *R v. Lawson* must now be read in the light of the decision of the Court of Appeal in *R v. Ward* [1993] 1996 CA 1 a case which does not appear to have been cited to the trial Judge. At p. 56 of the judgment Glidewell LJ, giving the judgment of the Court, summarized the principles of law and practice which now govern the disclosure of evidence by the prosecution before trial in criminal trials in the United Kingdom. Having first recited the duty of the prosecution to make available a witness whom the prosecution has decided not to call, the learned Judge went on to say:

> (ii) Unless there are good reasons for not doing so, the duty should normally be performed by supplying copies of the witness statements to the defence or allowing them to inspect statements and make copies: *Lawson*. Where there are good reasons for not supplying copies of the statements, the duty to disclose can be performed by supplying the name and address of the witness to the defence.

In the present state of authority in the United Kingdom it would seem, therefore, that only if there are good reasons for withholding a statement should the prosecution refuse to disclose it and make it available.

In the circumstances of the present case we think that the trial Judge, who in most respects dealt admirably with a perplexing body of evidence in a very protracted trial, should have realized that it would not be realistic to refuse production of Lau's statement on the ground that it was open to the defence to call him as a defence witness. It is clear that, by the time he gave his ruling, Counsel for the appellant, although they could not know the contents of the statement in detail, were satisfied that it could, at the very least, yield valuable matter for the purposes of cross-examination, and it is to be noted that this was one of the two grounds on either of which the Court in *Lawson* was prepared to interfere.

Although the complainant Goh was cross-examined to some extent on the basis that Lau had told the police that it was Goh who had initiated the violence, we do not find it possible to say that the defence was not materially hampered in the endeavour by Counsel to shake the only testimony which stood against the appellants on these serious charges. For these reasons we consider that a material irregularity occurred through a wrong exercise by the Judge of this discretion in refusing to order production.

We would like to add, however, that even had it not been for this feature of the trial we would have found it difficult to sustain the convictions. The issue of the credibility of witnesses, fundamental to any trial, was here confined principally to the opposing stories of Goh and the 1st appellant, the 2nd appellant and the absent Lau not having given evidence. We take full account of the need to be wary of trespassing on the territory of the "hearing and seeing" Judge, but the only reason given by the Judge for rejecting the evidence of Lim (PW8) was that he thought Lim had lied to protect his friend A1 and A2. There was evidence that Lim was on good terms with all of them but on distinctly better and closer and more neighbourly terms with Goh himself. The very fact that after the fracas Lim took part in negotiations to achieve an amicable, or at least a reasonable, pecuniary settlement between Goh and the brothers, acting as a go-between in some fruitless bargaining, does not on the face of it appear to justify the conclusion that he was lying. The evidence of Lim Teck Seng (DW5), who claimed to be a boyhood friend of Goh, was rejected for the same reason, although that witness had merely testified that it was Goh and not the 1st appellant who had approached him to assist in the negotiations.

Then there was the evidence of Professor Chao (DW8), the forensic expert who was dealing with photographs taken of the damaged premises immediately after the event. That witness was of the opinion that the blow or blows which broke the glass panel of the sliding door must have been struck from within the house and not from outside, as Goh had insisted, and further that the portion of the grille which had been wrenched away, since it does not correspond with the area of the panel which had been broken, being somewhat above it, could not have been broken in the process of the wrenching away of the metal grille. He was satisfied that this damage had been inflicted by more than one blow from within the house and supported his opinion by reference to his knowledge of the manner in which glass would fracture if it had been broken from outside. In that event, he said, because of the presence of the grille it would have been necessary to poke at the glass with the end of the pipe whereas the damage was more likely to have been caused by a blow within the house. He thought that the damage which he observed in the photograph of the glass cabinet must have been done by several controlled blows, since the objects within the cabinet had not been disturbed in any way and he thought it more likely than not (he put it at 60% to 40%, having examined the metal grille and the metal pipe) that the damage to the grille had been caused by using the pipe from within the premises. The same witness had also examined

the complainant on 24 July 1994 and he was of the opinion that the blow which had caused his injury had probably been struck from the front by somebody wielding the pipe from in front of the complainant and somewhat to his right side.

There was in our view the inherent improbability of Goh's claim that the 2nd appellant had been able to prise open the grille and struggle through the narrow gap thereby created, which - on his own showing, would have necessiated a considerable effort and the use of a chair - and then present himself outside the complainant's bedroom door in the time it had taken Goh himself to flee to his bedroom and seize his parang. This was something that he had never mentioned in his initial statement to the police.

Again there is the fact that the possibility of a frame-up was discounted by the Judge on the ground that Goh would neither have had the time nor, in view of his injury, the capacity to devise such a scheme. The evidence was that the incident must have occurred between 1.00 and 1.30 a.m. Goh said he went with Ah Sim to the hospital, a journey of some 5 minutes duration, sometime after 2.00 a.m. and it was not until 2.35 that he telephoned the police, presumably from the hospital. This would have left sufficient time to do the damage himself, and even by his own account the pain caused by the blow did not last a long time, although he did say he had suffered some dizziness in the following few days.

Finally, he was plainly not telling the truth when he said that the outer gate had been locked all the time and that the three men must, therefore, have climbed over it since his own account of the arrival of Lim (PW8) near the compound makes no mention of the latter having been similarly impeded. Nor did he suggest that, when leaving the compound after the arrival of his three friends, the appellants and their companion were compelled to repeat the manoeuvre. This is surprising since their entry in this manner was the substance of the trespass charge.

These matters taken together with the refusal by the prosecution to make Lau's statement available to the defence have persuaded us, after anxious consideration, that the convictions were unsafe and accordingly we allowed the appeals of both appellants and set aside the sentences.